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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
AND RONNIE CARTER, EXECUTIVE DIRECTOR
AND INDIVIDUALLY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The opinion of the United States Court of Appeals for the Sixth Circuit, *Brentwood Academy v. TSSAA*, 262 F.3d 543 (6th Cir. 2001), accurately recites the pertinent facts and procedural history of this case. The Statement of the Case in the Petition for Writ of Certiorari filed by the Petitioner Brentwood Academy ["Brentwood Academy"] does not. Petition pp. 2-8. Consistent with its tactics at each step of the litigation process, Brentwood Academy continues to distort the nature and effect of the TSSAA recruiting rule and to ignore even the Rules of the Supreme Court.[1] Petitioners injection of legal argument in its Statement of the Case does not lend any further credence to its misrepresentations of fact.

Contrary to the unfounded assertions of Brentwood Academy, the TSSAA recruiting rule does not impose a ban on contact between a school and a prospective student athlete. Brentwood Academy's penchant for hyperbole[2] will not change the recruiting rule into something it is not. The recruiting rule in Article II, Section 21, of the TSSAA By-Laws provides:

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[1] Appendices E and G to Brentwood Academy's Petition should be disregarded entirely. Appendix E consists of nine (9) pages of pure lay opinion. Passed off as an "amicus brief," Appendix E was in fact rejected for filing by the Sixth Circuit, and permission to file it has not been sought in this Court. Appendix G is nothing more than a summary of some of Brentwood Academy's arguments. An appendix is not a vehicle by which a Petitioner may disguise what are in effect additional arguments that otherwise exceed the 30 page limitation for the Petition. U.S. S. Ct. Rules 14 and 33.

[2] See Petition at 5 (referring to the recruiting rule as a "flat ban") and 14 (characterizing the recruiting rule as erecting a "Berlin Wall" around students).

> "The use of undue influence on a student (with or without an athletic record) the parents or guardians of a student by any person connected or not connected with the school to secure or retain a student ***for athletic purposes*** shall be a violation of the recruiting rule." [emphasis added].

The recruiting rule clearly addresses athletics only. It prohibits only the use of undue influence to secure a student *for athletic purposes*. As the Sixth Circuit noted, even Brentwood Academy's attorney recognized in 1993 that there are any number of ways that a school can communicate with a prospective student, even about athletics, without running afoul of the recruiting rule. *Brentwood Academy*, 262 F.3d at 552. A form letter to all prospective students which gives general school information, including information about athletics, is a type of school-initiated communication that can be used without violating the recruiting rule. Brentwood Academy can provide all the information it wishes about athletics during visits to the school by prospective students. Brentwood Academy can place advertisements in visual, audio, and print media to convey information about its athletic program. As long as the school's purpose is not to secure a student "for athletic purposes," the recruiting rule does not limit Brentwood Academy's interactions with prospective students at all.[3]

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[3] Pointing to the interpretive guidelines that accompany the recruiting rule, Brentwood Academy argues that the guidelines "bar school-initiated, targeted 'contact' for any reason," Petition at 2, not just the use of undue influence for athletic purposes. This assertion elevates the guidelines to a higher level than the rule itself. The interpretive guidelines apply only to the recruiting rule, which in turn proscribes only the use of "undue influence,"

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The recruiting rule is accompanied by a lengthy series of "questions and answers" and "interpretive guidelines" which enable the reader to better determine what types of conduct may constitute "undue influence" to secure a student for athletic purposes. These guidelines also guide and constrain TSSAA in its enforcement of the recruiting rule. Since these "questions and answers" and "interpretive guidelines" undermine its overbreadth challenge to the recruiting rule, Brentwood Academy looks elsewhere for an excuse to assert that the TSSAA Executive Director somehow has "unbridled discretion" to use the rule to arbitrarily suppress speech. Petition at 5. Brentwood Academy bases this argument on what is commonly referred to as the TSSAA "hardship rule," which is *purportedly* reproduced in Brentwood Academy's Appendix at page 6-D.[4] However, the "hardship rule" has nothing whatsoever to do with this case. The "hardship rule," by its terms, allows the Executive Director in certain specified circumstances to "set aside the effect of any *eligibility* rule on any *student*...." The recruiting

Footnote 3 Continued

and then only where the influence is used to secure the student "for athletic purposes." Contrary to Brentwood Academy's self-serving attempt to enlarge the scope of the rule, the TSSAA recruiting rule is concerned only with athletics. TSSAA regulates interscholastic athletic competition among member schools and nothing more. *Cf. Owasso Ind. Sch. Dist. No. 101 v. Falvo,* ____U.S.____, 2002 WL 23253 (Feb. 19, 2002) ("[T]he words of a statute must be read in their context with a view to their place in the overall statutory scheme." slip. op. at 7, quoting *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989)).

[4] At page 6-D of the Appendix to its Petition, Brentwood Academy quotes only a portion of the "hardship rule," which it claims to create "unbridled discretion" in the TSSAA Executive Director to waive the rules. The remaining substantive portion of the "hard-

Continued on Next Page

rule is not an eligibility rule for students. It is a rule that limits the athletic recruiting conduct of schools.

The recruiting rule violations that gave rise to this action were three-fold. First, the head football coach and athletic director at Brentwood Academy provided free passes that were used by two star middle school football players to gain free admission to a Brentwood Academy football game. Second, the same head football coach sent a letter in the spring of 1997 to a dozen male eighth-grade students, all of whom were still enrolled at other schools, inviting those students to attend spring football practice at Brentwood Academy. Third, the head coach then telephoned each of these twelve students to reiterate the invitation he had made by letter.[5]

Footnote 4 Continued

ship rule," omitted by Brentwood Academy, actually provides the "bridle" that Brentwood Academy claims is absent:

> "The conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and/or his or her parents, and such that none of them could have reasonably been expected to comply with the rule the violation of which is involved." Article II, Section 30, of the TSSAA By-Laws.

Setting aside the complete irrelevance of the "hardship rule," one can only speculate as to why Brentwood Academy chose to omit from the Appendix the latter portion of the rule .

[5] Brentwood Academy claims that it was "legal" for these students to participate in spring football practice, but "illegal" for the school to communicate about the practice with those students. This assertion is simply incorrect. As the Sixth Circuit recognized, there were numerous ways that Brentwood Academy could have notified prospective students about spring football practice. *Brentwood Academy,* 262 F.2d at 552. What it could not do, under the recruiting rule, is target prospective male athletes who were not yet enrolled at Brentwood Academy with personalized letters and phone calls from the head football coach.

Brentwood Academy's recruiting conduct had nothing to do with informing students of "educational opportunities" or with fostering "school choice." The conduct for which Brentwood Academy was found to be in violation of the recruiting rule clearly involved interactions with prospective athletes "for athletic purposes." Moreover, none of the violations were found based on any exercise of "unbridled discretion" by TSSAA. As the Sixth Circuit noted, Brentwood Academy's violations of the recruiting rule involved conduct expressly identified in the interpretive commentary that accompanies the rule. *Brentwood Academy*, 262 F.3d at 556.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

I. THIS CASE HAS NOTHING TO DO WITH "SCHOOL CHOICE."

Brentwood Academy attempts to transmute this case from a simple dispute about the agreed rules of a game into a forum on the politically charged issue of "school choice." Petitioner pretends to the role of school choice champion in order to curry political interest and invoke inapplicable First Amendment principles. School choice is, of course, an issue of national interest, but TSSAA's recruiting rule is not relevant to any aspect of the debate.

A. The Real Operation and Effect of the Recruiting Rule

Every student and parent in Tennessee has free and ready access to every bit of available information that Brentwood Academy chooses to disseminate about its educational, athletic, and spiritual programs. Among

other modes of communicating, Brentwood Academy can advertise in any medium, send mailings to any general populace of students, respond to student or parent inquiries, post flyers, or conduct presentations for a school's general student body. Every parent and student is absolutely free to choose Brentwood Academy for secondary school education.

The recruiting rule is designed, intended and applied to prevent one, and only one, form of inappropriate, exploitative and dangerous conduct -- soliciting and enticing child athletes because of their perceived athletic prowess. *Cf. Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding child labor laws against guardian's First Amendment challenge in order to deter exploitation of children).[6] Contrary to Brentwood Academy's bold assertion, "[T]here *is*...(a) core of easily identifiable and constitutionally proscribable conduct" addressed by the recruiting rule. *See Secretary of State v. Joseph H.*

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[6] *Prince* illustrates that even well-intentioned exploitations of children pose risks to the child that justify prophylactic statutes and rules. In 1996, Tito Lee graduated from Brentwood Academy as one of the top high school football players in Tennessee. Despite coming out of a "college preparatory" program, Lee did not meet academic requirements for college athletic eligibility. After an uneventful stint at a junior college, Lee lied to family and friends, telling them he was going to attend and play football at a nearby university. On August 3, 1998, the day he was to leave for school, Lee committed suicide. Another high school student with Tennessee connections, Amare Stoudemire, was the subject of a recent HBO television documentary about the pitfalls for minors created by athletic recruiting of secondary school athletes. Stoudemire has been recruited out of and into seven different high school basketball programs throughout the eastern regions of the United States. One "school" Stoudemire attended held "classes" in a single room basement, and its only "students" were the members of the basketball team.

Munson Co. Inc., 467 U.S. 947, 965-66 (1984). It is a "prophylactic measure whose objective is the prevention of harm before it occurs." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978). It focuses exclusively on the intent of adult recruiters who would otherwise allow their competitive zeal and desire for bragging rights to distort the proper role of athletic competition in secondary school education.[7]

Brentwood Academy mischaracterizes the recruiting rule by asserting that "the rule applies to athletes and non-athletes alike." Petition at 9. This false statement is apparently intended to thrust this case into the school choice debate. By definition, the recruiting rule applies only to student athletes or those perceived as such. The phraseology in the rule which Petitioner distorts is the prohibition of solicitation of a student athlete "with or without an athletic record." App. at 6-B. That language merely accounts for the everyday reality that not all athletically gifted junior high children have yet chosen to engage in *interscholastic* competition. The scope of the recruiting rule, therefore, is defined not by the student's prior athletic record, but by the wrongful motive of the recruiting school.

Brentwood Academy's assertion that the rule could somehow force an "independent school... to avoid interscholastic athletics or to ban students it recruits generally from interscholastic competition...," Petition at 9-10, is gross hyperbole. Brentwood Academy's own expe-

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[7] *See Crocker v. TSSAA*, 980 F.2d 382, 386-87 (6th Cir. 1992) (TSSAA is "entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life.")

rience of over thirty years under the recruiting rule illustrates the intellectual dishonesty of Petitioner's assertion. The recruiting rule has no effect whatsoever on school communications absent an intent to recruit the student *for athletic purposes*.

B. The Real Brentwood Academy.

Brentwood Academy shies away from any discussion of the real conduct for which it seeks constitutional protections. Brentwood Academy claims a First Amendment right to seduce eighth-grade athletes with the glamour of high profile football. Brentwood Academy's motive is not an altruistic desire to expand educational opportunities or to spread its purported beneficence to those who are less fortunate. Petitioner could *easily* accomplish those aims without targeted solicitation of child athletes from other public and private middle schools. Brentwood Academy wants the ability to pluck the best athletes from wherever it finds them. "School choice" is simply the guise of the moment for achieving that goal.[8]

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[8] While Brentwood Academy was represented by attorneys Lee Barfield and Tom Nebel in two separate appeals before TSSAA from the initial findings of Ronnie Carter, "free speech" was never mentioned. Only after Vanderbilt law professor James Blumstein was engaged to assist with litigation was the First Amendment argument concocted as a basis for asserting federal court jurisdiction (in addition to assertions of antitrust law violations). The "school choice" argument, like the "free speech" argument, is simply the latest artifice for perpetuating federal court litigation. Just like an over-zealous football coach, Brentwood Academy is doing whatever it takes to avoid a loss. This Court should not spend more time on what is, in reality, a disingenuous contrivance for litigation purposes. *See Ginzburg v. United States*, 383 U.S. 463, 470 (1966).

This Court has long recognized that "the circumstances of dissemination of material are...relevant to determining whether (the) social importance claimed for material (is) pretense or reality" and whether it is the true reason for dissemination "or a spurious claim for litigation purposes." *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). *See also Splawn v. California*, 431 U.S. 595, 598-99 (1977). "Educational alternatives" are no more than possible and unintended by-products of Brentwood Academy's real objective, to solicit minors for exploitation on the football field.[9]

Hoping to gain a competitive advantage in athletics over schools who could never recruit, Brentwood Academy, speaking as a poseur for school choice, makes the predictable assertion that "(m)aintaining a competitive balance in athletics is not a legitimate basis for suppressing speech and thereby restricting educational opportunities for students." Petition at 12. There are two fundamental flaws in this unsupported assertion by Petitioner. First, the recruiting rule does not suppress speech; it restricts the time and manner of athletic recruiting conduct. The recruiting rule has no effect on the availability of any educational opportunity.

Second, Petitioner's denigration of "maintaining a competitive balance" as a "legitimate" interest is contrary to the First Amendment teachings of this Court. The penultimate First Amendment "competitions" are American political campaigns, and this Court has protected the "level playing field" for elections by upholding

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[9] Sam Ginsberg could have made equally sincere claims that he was promoting reading skills among the children to whom he sold pornographic magazines in *Ginsberg v. New York*, 390 U.S. 629 (1968).

restrictions designed to limit the undue influence of size and bankroll in order to maintain competitive balance and fairness. *See, eg., Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (refusing to apply strict scrutiny to state campaign contribution limits); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curium*) (federal contribution limits); *Burson v. Freeman*, 504 U.S. 191 (1991) (upholding restrictions on voter solicitation conduct near voting polls). Surely, the regulation of high school athletics does not require a *higher* level of scrutiny than the limitations on the core expressive conduct of political contributions upheld in *Buckley* and *Shrink Missouri*. Whether the context be high school athletics, commerce, or politics, the government purpose in enforcing regulations to maintain a level playing field is not to ban any specific speech content but to promote fair competition.[10] All competitions, whether in the fields of athletics, commerce, or politics, involve rules. When a voluntary participant breaks the rules so as to gain unfair competitive advantage and endanger all participants, the rule breaker must expect consequences. *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (athletics); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (commerce); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982) (politics).

As its final line of pretense in the school choice arena, Petitioner attempts to invoke the rights of the student

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[10] In this regard, the recruiting rule is analytically less disruptive of First Amendment rights than the limitations on voter solicitation upheld in *Burson* in order to protect against abuses in the electoral process. The recruiting rule only regulates the solicitation of minors in a largely public education system, and the recruiting rule does not limit or address core political speech.

athletes and families it wants to solicit. According to Brentwood Academy, the recruiting rule somehow abridges the liberty rights of students under *Meyer v. Nebraska*, 262 U.S. 390 (1923), and the decision-making rights of parents under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), even though the recruiting rule does not in any way restrict or prohibit student attendance at any independent school (*Pierce*) nor student participation in any activity at an independent school (*Meyer*). The recruiting rule merely restricts the manner in which Petitioner can solicit students or thrust itself into the parent-child decision-making process.

No parent or student has claimed that the recruiting rule deprived them of any information about academics, athletics, or financial aid at Brentwood Academy. No parent or student has complained that they wanted *more* uninvited intrusions by Brentwood Academy in their family deliberations. No parent has stepped forward to ask for *more* direct solicitation of his or her child for athletic purposes.

The State has a substantial interest in the integrity of the family unit and shares with parents a responsibility to nurture and protect children. *Prince,* 321 U.S. at 165-66; *Pierce,* 268 U.S. at 535. State authority complements parental authority, and this Court has recognized "the special interest of the State" in encouraging minors to seek parental advice. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 639 (1979). Indeed parents "are entitled to the support of laws designed" to assist the parent by protecting family integrity and supporting parent/child decision making. *Id.*

The recruiting rule actually serves to prevent unwanted intrusions into family affairs and reduces the

potential for conflict about school choice between a concerned parent and a child who may have been targeted by a recruiter. Under the recruiting rule, the *parent* decides to make the initial inquiry about athletic competition, not a *recruiter* whose paramount interest is to use the child's body to win more football games.

The issue of school choice is certainly a matter of substantial national interest. No doubt, more cases like *Zelman, et al. v. Simmons-Harris*, No. 00-1751, argued on February 20, 2002, will come before this Court to squarely frame the pertinent Constitutional issues for analysis and argument by interested and sincere advocates. This is not such a case. Brentwood Academy is not a sincere champion of any aspect of school choice. Brentwood Academy simply wants to recruit bigger, stronger and faster child athletes for its teams. TSSAA simply wants to enforce a recruiting rule that for decades has served the State's substantial interests. The issue of school choice should be reserved for cases that truly present the issue with interested and sincere advocates on both sides.

II. INTERMEDIATE SCRUTINY IS THE PROPER STANDARD OF REVIEW FOR PETITIONER'S FREE SPEECH CHALLENGE OF TSSAA'S RESTRICTIONS ON THE TARGETED SOLICITATION OF MINORS FOR ATHLETIC PURPOSES.

A. The Actual Ruling and Analysis of the Court of Appeals

The Court of Appeals held that intermediate scrutiny is the appropriate standard for a First Amendment free speech challenge to a voluntary association rule that restricts a member school's targeted solicitation of children for athletic purposes. The Sixth Circuit con-

cluded that TSSAA's recruiting rule allows parents and students to obtain, and Brentwood Academy to disseminate, all available information about the school's academic, athletic, and financial aid programs. According to the Sixth Circuit, the recruiting rule does not ban any information; it restricts the time and manner of specific conduct regardless of content.

Contrary to Petitioner's representation, the Court of Appeals did not invert the proper analytical process for determining whether the recruiting rule is a content-based regulation, nor did it "misperceive( ) this Court's 'secondary effects' cases." Petition at 15. Instead the Sixth Circuit correctly found that the recruiting rule was a content-neutral regulation of a category of *conduct* and that the rule allowed ample alternative channels for Brentwood Academy to communicate its message.

The Court of Appeals readily acknowledged the *general* principle "that the 'government may not regulate speech based on its substantive content or the message it conveys'." 262 F.3d at 551 (quoting *Rosenberger v. Rectors & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995)). Unlike Brentwood Academy, however, the Court of Appeals did not end its analysis with a reflexive assumption that the recruiting rule was a content-based restriction on protected speech. The court looked instead to the application of the rule and found it to be a content-neutral regulation of certain proscribable conduct. As this Court has noted, in the assessment of restrictions on solicitation activity, "the appropriate focus is on (the) conduct." *Ohralik*, 436 U.S. at 463.

The Sixth Circuit's focus on athletic recruiting as content-neutral conduct is plainly evident from the

court's reliance on *Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Village of Stratton Ohio*, 240 F.3d 553, 560 (6th Cir. 2001), and the discussion therein of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), *United States v. O'Brien*, 391 U.S. 367 (1968), and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). In *Clark* the Court applied intermediate scrutiny to uphold a ban on camping in certain national parks even though the specific camping at issue was core political expressive conduct in protest of the plight of the homeless. 468 U.S. at 288-99. In *O'Brien*, the Court upheld a conviction for burning a draft card, declaring that regardless of the intended political message of the act of protest, the government regulation of conduct passed muster under the same intermediate scrutiny that applies to time, place, and manner restrictions on speech. *Forsyth County* involved a prior restraint license and fee for authorization of public speaking, parades, and assemblies involving core political activity, which the Court addressed under intermediate scrutiny as a restriction on the time, place, and manner of expressive *conduct*. This Court invalidated the ordinance not under strict scrutiny, but because of excessive discretion in the licensing authority under the intermediate scrutiny standard.

Athletic recruiting by any high school is an act, an occurrence, an event. Regardless of the specific content of any recruiter's message, the simple conduct of athletic recruiting is a proscribable event, and "it has never been an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct (is) in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik*, 436 U.S. at 456 (quoting *Giboney v. Empire*

Storage & Ice Co., 336 U.S. 490, 502 (1949)). Aside from the question of whether Brentwood Academy's recruiting messages have content that might also be proscribable because of the targeting of vulnerable minors, the mere *occurrence* of recruiting may be regulated subject to intermediate scrutiny because State regulation is triggered by the event rather than the content of any speech during the event. Just as the government could prohibit camping on its property in *Clark* even though the act of camping carried a core political message, so too may TSSAA prohibit the act of solicitation of minors within the State's domains of secondary education and interscholastic athletics. Just as the government interest in the administration of the selective service system in *O'Brien* justified punishment of the act of burning a draft card, so too may TSSAA punish the act of recruiting because of the State's substantial interests in the effects of recruiting on children and the administration of the State's education policies. Just as the permits for political events and activities in *Forsyth* were reviewed under intermediate scrutiny for time, place and manner restrictions, so too must TSSAA's Recruiting Rule be viewed as a reasonable restriction on the time and manner of Brentwood Academy's solicitation of minors.

The Court of Appeals essentially did nothing more than apply the differential analysis of speech restrictions discussed in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Even assuming that there is some "content-based" element in restricting athletic recruiting, Petitioner's conduct is still proscribable because the so-called content basis of the restriction — athletic recruiting of minors — "consists entirely of the very reason the entire class of speech at issue is proscribable...." *R.A.V.*,

505 U.S. at 388.[11] In such cases, "no significant danger of idea or viewpoint discrimination exists." *Id.* TSSAA does not discriminate among different ideas within the narrowly defined field of 'recruiting minors for athletics.' All conduct within the parameters of the recruiting rule is proscribable regardless of any substantive differences in the messages or techniques employed by the solicitor. Consequently, the Sixth Circuit correctly held that the recruiting rule is a content-neutral restriction on conduct to be reviewed under intermediate scrutiny.

In *R.A.V.* this Court also acknowledged that some content defined classes of speech can be regulated *because* of the "secondary effects" of the speech:

> "Another valid reason for according differential treatment to even a content defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the... speech.' *Renton v. Playtine Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 929, 89 L.Ed.2d 29 (1986)."

R.A.V., 505 U.S. at 389 (emphasis in original). "A regulation that *serves purposes unrelated to the content* ...is

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[11] The Court has consistently rejected the argument that government restrictions on harmful conduct suddenly fall victim to strict scrutiny whenever the conduct involves an element of speech. *See eg. Ohralik*, 436 U.S. at 457 ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities,... corporate proxy statements,... the exchange of price and production information among competitors,... and employers' threats of retaliation for the labor activities of employees...") (citations omitted).

deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added).

The "secondary effects" of soliciting minors for the purpose of athletic recruiting are substantial. These "secondary effects" do not all depend on the specific content of any solicitation nor on whether the listener is or is not persuaded by the message. The simple act of direct solicitation of a minor intrudes on the integrity of the family and usurps the parent's role as the initial and primary conduit of information to the child for important life decisions. The State has a substantial interest in assisting parents in the nurturing of children.

Regardless of the content or ultimate persuasive effect, the simple act of recruiting minors solely for athletic purposes also undermines the State's policies and decisions regarding the proper role of interscholastic athletics in the overall, integrated scheme for secondary education. The mere occurrence of athletic recruiting distorts and elevates the importance of athletics in the State's mix for a balanced educational environment. *Crocker,* 980 F.2d at 386-87. The mere occurrence of recruiting undermines the State's efforts to inculcate fundamental societal values such as fair play, integrity, and respect for the rule of law. Fourteen year-old children do not need yet another reason to believe that unfair competition and rule-breaking are the keys to success. The decisions of the State of Tennessee regarding the proper role of athletics in the educational setting are entitled to substantial deference. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The State also has a substantial interest in avoiding

any undue risk of physical injury to all children. Some risk of injury is inherent in athletic competition, and there is no dispute that at any given time a particular school may, by coincidence, have some advantage over its competitors in terms of size, speed and strength. That risk, however, is a far cry from the risk posed by sending a normal high school team into battle against a team with a dangerously abnormal concentration of size and strength as the result of targeted solicitation of youth. The "primary effect" of successful recruiting of individual children ultimately produces the cumulative "secondary effect" of an unreasonable risk of injury to others through the abnormal and unfair concentration of size and strength on one high school team.

Brentwood Academy's recruiting conduct is inherently harmful regardless of the specific content of the message it uses to solicit minors. Under the principles of *Clark*, *O'Brien*, *Forsyth County* and *R.A.V.*, the Sixth Circuit correctly held that Brentwood Academy's First Amendment challenge of the Recruiting Rule only warranted, at most, intermediate scrutiny. Under *Kuhlmeier*, TSSAA's judgments and standards in furtherance of the use of interscholastic athletics as part of the State's education of children are entitled to substantial deference. "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273.[12]

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[12] The same facts which led this Court to conclude that TSSAA is a "state actor", *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001), also call for deference to TSSAA's rules and decisions as those of the state and local educators and school officials found to control TSSAA.

B. There is No *Per Se* Rule of Strict Scrutiny for "Content-Based" Restrictions.

The fundamental flaw that tarnishes every argument of Brentwood Academy is its dogmatic assertion that any restriction of conduct regarding specific subject matter is automatically deemed to be a "content-based" ban that must be subjected to strict scrutiny regardless of any other factors or circumstances. It is this "content-based" podium from which Petitioner invokes inapposite First Amendment precedents and from which Petitioner denounces or simply ignores principles and precedent that are directly applicable to this case.

Some of the opinions of this Court appear to have declared a rule of strict scrutiny for any restriction that is in any way based on the subject matter of a message. *See eg. Police Dept. of Chicago v. Mosely*, 408 U.S. 492, 499 (1972); *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). However, the category of speech has frequently led the Court to make content-based distinctions as to the proscribability of certain speech and the standard of review for government restrictions. *See, eg. R.A.V. v. St. Paul*, 505 U.S. 377, 420-22 (Stevens, J., concurring) (partial cataloguing of examples of *content-based* regulations that have been upheld for zoning restrictions, broadcasts of specific words, commercial versus political advertising, partisan speech by state employees, misleading advertising and trade practices, employer speech in labor matters, advertising of cigarettes but not cigars, solicitation by lawyers but not doctors). The distinction between protected speech and the defined categories of "non-speech" such as obscenity, fighting words and defamation, is also necessarily content-based, and in some instances the same content is subjected to

different levels of scrutiny depending on the nature of the speaker, or the audience, or the forum.

C. The Pertinent Factors that Petitioner Ignores.

Brentwood Academy does not discuss those aspects of its expressive conduct which this Court has often cited as independently sufficient reasons for lowering the level of First Amendment scrutiny such as an audience of minors, deference to State policymaking for education, government "property," commercial solicitation, targeted solicitation, protection of family integrity, risk of undue influence, fair competition, and pretextual constitutional claims. These factors have each been found by this Court to justify a lower level of scrutiny for restrictions on speech. The confluence of *all* these factors for Brentwood Academy's conduct suggests that TSSAA's proscription of Brentwood Academy's solicitation of minors warrants intermediate scrutiny at most. Brentwood Academy, however, asks for this Court's time and resources to present a demand for strict scrutiny review without even acknowledging the special nature and circumstances of its own conduct.

1. Voluntary Membership and the Voluntary Contract for Agreed Rules

Year after year for 30 years Brentwood Academy voluntarily renewed its contract to have TSSAA regulate the sports in which the school participated in exchange for Petitioner's voluntary promise to comply with all TSSAA rules, including the recruiting rule. No state law or regulation requires TSSAA membership, and some Tennessee schools elect not to join. As was true of the University of Nevada Las Vegas in *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988), Brentwood Acad-

emy "could have voluntarily withdrawn from the Association" at any time it chose and then engaged in whatever recruiting activity it desired. The only consequence would have been that Brentwood Academy could not have competed in the post-season tournaments sponsored by TSSAA. Instead, Petitioner voluntarily joined the TSSAA "team," accepted all the benefits of TSSAA membership, and agreed to the programmatic policies of TSSAA.[13]

By voluntarily agreeing to TSSAA rules in order to reap the benefits of TSSAA membership, Petitioner chose the benefit rather than the unfettered right to solicit minors.[14] In this respect Brentwood Academy is in no different position than the student athletes who join a football team and agree to comply not only with the rules of the game but also the team rules and the school rules. "By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657

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[13] The government may in some circumstances constitutionally limit access to a government benefit on a basis that restricts freedom of speech. *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540 (1983) (denying tax exempt status for charitable donation where the charitable organization conducts lobbying activities, does not violate the First Amendment); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) (no violation of rights in state denial of unemployment compensation to workers who lose jobs as a result of a labor dispute).

[14] *See*, *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991); *Grove CityCollege v. Bell*, 465 U.S. 555, 575 (1984): *Legal Aide Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017, 1028 (9th Cir. 1998) ("By choosing to accept the government benefit, a recipient voluntarily consents to any restrictions placed on the receipt of the benefit").

(1995) (upholding random urinalysis requirement for participation in interscholastic athletics). The Court in *Vernonia* further emphasized the pivotal importance of a complainant's voluntary decision to agree to common rules: "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights...." *Id.* (citations omitted).

2. An Audience of Minors in the Setting of Secondary School Education.

Brentwood Academy stands curiously silent on the constitutional significance of the fact that its speech and conduct are directed to an audience of minor school children. By implicitly suggesting that the recruiting rule should be evaluated on the basis of First Amendment standards for adults, with a blind eye to the special constitutional standards for children, Brentwood Academy asks this Court to follow its lead into fundamental analytical error. As noted in *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979):

> The Court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: "[C]hildren have a very special place in life which law should reflect. *Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty towards children.*"

Id. (emphasis added) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring opinion)).

Although minors certainly enjoy rights under the First Amendment, *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 506 (1969), this Court has made abundantly clear that the State is allowed considerably more power and discretion in regulating speech and conduct involving children. *See, e.g. Ginsberg v. New York*, 390 U.S. 629 (1968) (conviction for sale of non-obscene material to minors); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (regulation of radio broadcasts reaching minors); *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986) (content-based disciplinary actions for lewd speech); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (censorship of core speech in student newspaper when the censorship was "reasonably related" to "legitimate pedagogical concerns."). The special protections for children extend even further when the exploitation of minors might be curtailed. *Compare Stanley v. Georgia*, 394 U.S. 557 (1969) (First Amendment right to possess even obscene materials), *with Osborne v. Ohio*, 495 U.S. 103 (1990) (No First Amendment right to possess child pornography).

In virtually every case involving an audience of minors, this Court has looked at the content of the restricted speech, the "nuances of presentation and the context of its dissemination," *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (Brennan, J., dissenting), as well as the State's legitimate interest in regulating the specific conduct, subject area and content of the speech. Thus, for example, rather than "uncritically transfer(ing)" the "legal theories and their phrasing," from *Cohen v. California*, 403 U.S. 15, 18 (1971), to a case involving minors, as Brentwood Academy suggests, Petition at 30, this Court has looked beyond the black letter rules for adults to the special circumstances

and considerations for children in each case. No doubt this kind of discriminating analysis is why "[t]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Bethel Sch. Dist. 403*, 478 U.S. at 682-83 (quoting *Thomas v. Board of Education, Granville Central School Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

Moreover, states are traditionally shown great deference by the courts on matters of educational policy and the choice of methods for teaching societal values. *Bethel School District* (punishment for slightly lewd speech); *Hazelwood School District* (censorship of student newspaper); *Vernonia School District* (compulsory urinalysis); *New Jersey v. TLO*, 469 U.S. 325 (1985) (warrantless search of purse); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment). The State and TSSAA should be allowed reasonable powers to restrict activities that undermine State policies, methods and goals for education.

3. The Solicitation Issues.

The conduct for which Brentwood Academy claims the ultimate protections of the First Amendment is the targeted solicitation of minors for either commercial gain, or even less worthy of protection, the ego gratification of adults. This simple fact immediately renders irrelevant every "solicitation" precedent cited by Brentwood Academy.

Only the "charitable solicitation" cases and some "associational solicitation" cases offer any hope of strict scrutiny review of restrictions on solicitation conduct. Consequently, Petitioner cites only those cases. *See*

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) (solicitation for charity); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (solicitation for charity); *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (solicitation for charity); *In re: Primus*, 436 U.S. 412 (1978) (political association solicitation); *NAACP v. Button*, 371 U.S. 415 (1963) (same). Brentwood Academy does not solicit for charity, but for the physical talents of athletically gifted minors. More importantly, the primary reason for strict scrutiny in *Riley*, *Munson*, *Schaumberg* and the other charitable solicitation cases was the government's prior restraint requirement of a license or permit — a factor not presented by the TSSAA recruiting rule.

The recruiting rule also cannot be equated with the prior restraints on the core political activity of union organizing in *Thomas v. Collins*, 323 U.S. 516 (1945), nor the violation of First Amendment associational rights in *In Re: Primus* and *NAACP v. Button*. Brentwood Academy's claim invokes no prior restraint licensing requirement, no core political speech, and no infringement of the First Amendment right of association.

The cases that directly apply in this case are the commercial solicitation cases. Any speech affected by the recruiting rule is commercial speech. The purpose of recruiting is to secure attendance in order to generate tuition and athletic department revenues. When Brentwood Academy recruits a targeted student athlete, it is proposing a commercial transaction. The "solicitation" of young athletes by Brentwood Academy is every bit as commercial as was the solicitation of clients by lawyers in *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), and *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995). In fact, Brentwood Academy's athletic re-

cruiting is analytically indistinguishable from the proscribable solicitation conduct of lawyers.

In both lawyer solicitation and high school athletic recruiting the client or athlete is solicited in person (*Ohralik*) or by targeted direct mail (*Went for It*) "for pecuniary gain in circumstances likely to pose dangers that the State has a right to prevent." *Ohralik*, 436 U.S. at 449. In both situations "the State bears a special responsibility for maintaining standards among the licensed professions."[15] 436 U.S. at 460. In both settings "the substantive evils of solicitation" include the potential "of overreaching and the exertion of *undue influence*"[16] and the need "to protect the privacy of individuals." 436 U.S. at 461. In both situations the soliciting party may claim that they are "communicating information" about opportunities such as legal rights or educational alternatives (which they could easily communicate without targeted solicitation), but in each case the recruiter/solicitor is "using the information as bait with which to obtain an agreement." 436 U.S. at 458. In both situations "the aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage...uninformed decision-making...." 436 U.S. at 457. In both cases the circumstances of the target "not

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[15] As part of its comprehensive and integrated program for education, Tennessee requires licensure of education "professionals" and educational institutions such as Brentwood Academy.

[16] Throughout this litigation Petitioner has challenged the alleged vagueness of the term "undue influence" in the recruiting rule. This Court, however, has found the term "undue influence" particularly apt for describing the proscribable conduct of one with superior knowledge, experience and persuasive powers engaging in direct solicitation of another who is in a position of relative vulnerability. *Ohralik*, 436 U.S. at 461-62.

only makes him more vulnerable to influence but also may make advice all the more intrusive." 436 U.S. at 465. In both settings "in-person solicitation is not visible or otherwise open to public scrutiny," and unless the State can impose "what in effect, is a prophylactic rule" to prevent harm before it occurs, "in-person solicitation would be virtually immune to effective oversight." 436 U.S. at 466.

In Tennessee vulnerable legal clients are protected from the dangers of targeted solicitation by Disciplinary Rules 2-102, 2-103, and 2-104. Vulnerable children who are blessed with athletic skills are protected from the dangers of uninvited targeted solicitation by the TSSAA recruiting rule.[17] TSSAA's restriction of Brentwood Academy's commercial speech and the proscribable conduct of athletic recruiting should only be subjected to intermediate scrutiny under the First Amendment.

III. THE RECORD IS NOT RIPE FOR REVIEW OF THE ISSUES RAISED BY BRENTWOOD ACADEMY.

Brentwood Academy's request for review is premature. "It is not the usual judicial practice (nor does the Court) consider it generally desirable, to proceed to an overbreadth issue unnecessarily - that is, before it is

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[17] In several cases this Court has drawn a sharp distinction between targeted solicitation, such as Petitioner's recruiting activity, and untargeted, broad-market solicitation such as advertising, which is permissible under the recruiting rule. *Compare Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (invalidating prohibition of general advertising by lawyers) *with Went for It*, 515 U.S. 618 (upholding prohibition of targeted direct mail solicitation by lawyers) *and Ohralik*, 436 U.S. 447 (1978) (upholding prohibition of in-person solicitation by lawyers).

determined that the statute would be valid as applied." *Bd. of Trustees State University of New York v. Fox*, 492 U.S. 469, 485 (1989). This is because of the Court's "reluctance to strike down a statute on its face where there (are) a substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974).

Brentwood Academy, however, again relies on inapplicable precedents to try to gain the time of this Court. The cases cited by Brentwood Academy involve prior restraints in the form of pre-speech licensing requirements combined with elements of excessive administrative discretion. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992); *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Thornhill v. Alabama*, 310 U.S. 88 (1940). This Court has emphasized the historical abhorrence of prior restraint licensing, *Thomas v. Chicago Park Dist.*, ____ U.S. ____, 122 S.Ct. 775, 778-79 (2002), and cases involving prior restraint licensing have typically received the harshest treatment by the courts. In the absence of "unbridled discretion" and prior restraints, this Court has consistently required adjudication of "as applied" challenges before reaching a facial challenge.

As previously discussed, Brentwood Academy's claim of "unbridled discretion" does not withstand scrutiny. The recruiting rule is accompanied by guidelines and other materials which guide and constrain TSSAA's exercise of discretion. The "hardship rule", on which the claim of "unbridled discretion" is based, has been misrepresented by Brentwood Academy as to both the relevance and the terms of the rule. That rule, which has nothing to do with recruiting conduct, includes provisions omitted by Brentwood Academy from its Appen-

dix, provisions which provide the "bridle" Brentwood Academy claims is missing. Finally the term "undue influence," a term this Court found acceptably definite in *Ohralik*, is no less definite here. The fact that a rule leaves some matters subject to interpretation by those responsible for enforcement does not equate to "unbridled" discretion. If Brentwood Academy's concept of "unbridled" discretion were accepted, virtually every law or rule would be constitutionally suspect.

Nor is there any apparent danger that the alleged overbreadth will "chill" the speech of others while the "as applied" challenges are resolved in the District Court. The recruiting rule and the interpretive guidelines clearly identify the conduct proscribed, *Roth v. United States*, 354 U.S. 476 (1957), and the Court of Appeals correctly noted that Brentwood Academy's violations fell squarely within specific examples of proscribed conduct set forth in the rule's interpretive guidelines. 262 F.3d at 556. Moreover, because the proscribed recruiting is actually the commercial solicitation of minors, the overbreadth doctrine does not even apply in this case. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

Brentwood Academy's final assertion is that the recruiting rule is somehow a restriction on "pure speech" subject to facial challenge under the the "novel and narrow" question addressed by the Court in *Bartnicki v. Vopper*, ____U.S. ____, 121 S. Ct. 1753, 1757 (2001). *Bartnicki* did not announce a new or developing doctrine for "pure speech." The very narrow holding of the Court was that a newspaper could not be held liable under 18 U.S.C. § 2511(c) for publishing the contents of a conversation obtained through an illegal wiretap performed not by the newspaper but by an unidentified

source. *Bartnicki* is irrelevant. Brentwood Academy's argument about "pure speech" and a *per se* prohibition of communication has been squarely considered and rejected by this Court in the context of government restrictions on solicitation conduct. *Ohralik*, 436 U.S. at 462-67.

This case has not progressed in the trial court beyond cross-motions for summary judgment based on legal arguments. The Court should not devote attention to the merits of the case without a record that is ripe for review.

CONCLUSION

Brentwood Academy grasps at every First Amendment theory imaginable, hoping that at least one can be perverted to suit the school's needs. This case is not, and has never been, about free speech or school choice. It is about an over-zealous football coach who was caught engaging in recruiting conduct clearly prohibited by TSSAA rules. It is a case that has been elevated to the absurd by creative lawyers and a well-heeled private school. Of the thousands of Petitions before this Court each year, this is certainly not one of those few worthy of the Court's time. Brentwood Academy's Petition should be denied.

Respectfully submitted,

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